TESTIMONY FOR THE OVERSIGHT HEARING ON THE IMPLEMENTATION OF THE USA PATRIOT ACT: SECTIONS 201, 202, 223 OF THE ACT THAT ADDRESS CRIMINAL WIRETAPS, AND SECTION 213 OF THE ACT THAT ADDRESSES DELAYED NOTICE

BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
HOUSE JUDICIARY COMMITTEE

BY

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May 3, 2005

Chairman Coble, Ranking Member Scott, Members of the Subcommittee, thank you again for inviting me to testify on the Patriot Act. You deserve applause for your oversight today.

The results of the debate over the extension of the Patriot Act's more intrusive provisions will define this Congress in our Nation's history. Will Congress correct some of the provisions that were hastily passed just days after the tragic attacks of 9-11 and bring the statute back in line with the command our nation's charter, our Constitution? Will Congress adopt safeguards to properly focus our law enforcement efforts on terrorists rather than ordinary Americans?

I am here today because I am confident that, working together, we can do just that and honor both the letter and the spirit of our Fourth Amendment freedoms by bringing the Patriot Act back in line with the Constitution.

My name is Bob Barr. From 1995 to 2003, I had the honor to represent Georgia's Seventh District in the United States House of Representatives, serving that entire period with many of you on the House Judiciary Committee.

From 1986 to 1990, I served as the United States Attorney for the Northern District of Georgia after being nominated by President Ronald Reagan, and was thereafter the president of the Southeastern Legal Foundation. For much of the 1970s, I was an official with the CIA.

I currently serve as CEO and President of Liberty Strategies, LLC, and *Of Counsel* with the Law Offices of Edwin Marger. I also hold the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union, consult on privacy issues with the American Civil Liberties Union, and am a board member of the National Rifle Association.

I am also the Chairman of a new network of primarily conservative organizations called Patriots to Restore Checks and Balances, which includes the American Conservative Union, Eagle Forum, Americans for Tax Reform, the American Civil Liberties Union, Gun Owners of America, the Second Amendment Foundation, the Libertarian Party, the Association of American Physicians and Surgeons, and the Free Congress Foundation.

You have asked me to testify today about sections 201, 202, 223, and 213 of the Patriot Act. I will focus the bulk of this testimony on section 213, the "sneak and peek" provision, and reserve some brief comments on the other provisions at the end of this written statement.

Section 213 of the Patriot Act authorizes "sneak and peek," or "delayed notice," search warrants in all criminal cases-- without limitation to cases involving terrorism or a foreign agents--where the federal government says notice of the search warrant would result in destruction of evidence, the endangerment of an individual's life or physical safety, flight from prosecution, intimidation of a witness, or serious jeopardy to a criminal investigation. The Act sets no limit on the length of time such a search of a person's home or business can be kept secret. Section 213 is not subject to sunset this year but should be amended and should be given a new sunset as amended, if it is not repealed.

I have grave concerns about covert searches of people's homes or businesses in general and about the design of this statute in particular. I would hope the Members of the Judiciary Committee would agree with me on one fundamental premise of American law. The idea of strangers, including government agents, secretly entering the privacy of our homes and examining our personal possessions is a threat to the fundamental freedoms our Fourth Amendment was written to protect.

Secret searches of American homes and businesses must not be allowed to become routine. They must be closely circumscribed. Although one might imagine a rare circumstance where a short delay in notice might be compelling and even pass scrutiny under the Fourth Amendment, secret searches should not be allowed to become a garden-variety tool of law enforcement. The Patriot Act, however, permanently enshrined secret searches of American homes and businesses in our law under the guise of anti-terrorism efforts.

As members of the House Judiciary Committee, you know well that the House Judiciary Committee's original marked-up version of the Patriot Act did not include statutory authority for secret criminal searches, although the Administration had asked for it. The "sneak-and-peek" provision was imposed on you by the Senate at the last minute in a substitution of the bill this Committee produced. Respectfully, I believe this addition to the bill was a serious mistake, but there was no time then to correct it. There is time now.

Giving federal law enforcement statutory authority for secret criminal search warrants in ordinary criminal cases has nothing to do with "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," as the Patriot Act was pitched to the American people. We all know that. As the American people have come to understand that, they too have expressed strong reservations about the use of such extraordinarily intrusive and secretive powers, especially where such searches are not used to obstruct terrorist attacks.

If Congress chooses to continue to give statutory authority for these covert-entry, delayed-notification searches, they should be carefully limited to ensure that what should be the rarest of exceptions does not become the rule. The Patriot Act, however, has inadequate controls. And, even though the sneak and peek authority is not set to sunset by the end of the year, I urge you to support the addition of sound and modest checks on the use, and also against the abuse, of this secret search authority.

Section 213 of the Patriot Act, as codified at 18 U.S.C. § 3103a (2004), contains at least two fundamental flaws. First, it fails to set a statutory time limit on secret searches. The statute requires notice of the execution of a sneak and peek warrant within a "reasonable period of its execution," but sets no time limit on when such notice is required.[1]

From the outset, critics of the Patriot Act have warned that such open-endedness would result in these warrants being used to justify the indefinite delay of notice. Attorney General Gonzales recently testified that at least six of the secret searches that have been authorized under section 213 were authorized to be secret indefinitely, even though the Department has simultaneously said that a secret search under section 213 cannot be kept secret forever. The Attorney General

[1] 18 U.S.C. § 3103a(b)(3).

has also testified that the "average" length of time a search is kept secret is between 30 and 90 days, but the government has not shared the details of most of its secret searches with the American people and has shared only limited information about a few carefully selected ones it wanted to discuss.[2]

The indeterminateness allowed by the statute as it currently exists is directly contrary to the rulings in the only two circuit courts to fully consider the issue of a lower court authorizing criminal search warrants with delay in notification allowed before the Patriot Act.[3] In the first such case, a circuit court held that "in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such a time should not exceed seven days except upon a strong showing of necessity."[4]

The only other circuit court to consider a lower court-approved delay in notice of a search, the Second Circuit, insisted on a specific time period for notice of a secret search, holding that notice could be delayed for only seven days unless there were fresh showings of cause for extensions.[5] Prior to the Patriot Act and since it passed, the Supreme Court has not issued any decisions endorsing the constitutionality of secret criminal search warrants, except in the limited context of warrants authorizing the installation of devices (i.e., bugs) for audio surveillance specifically authorized by statute, a decision the Department wrongly relies on as authority for its position that the Court has approved "sneak and peek" searches for general purposes.[6]

The idea that giving an American citizen notice that their home or business is being searched by the police is central both to the spirit and to the letter of the Constitution. Indeed, the principle that law enforcement should "knock and announce" their presence before executing a search warrant was well entrenched in the common law by the time of the Constitution's ratification, going back perhaps an additional 300 years before the American Revolution.[7]

Notably, the dreaded general warrants or "writs of assistance" wielded by the British crown's customs inspectors in colonial America actually "required that notice be given before entry was made, and reported instances of [their] use included notice."[8] These searches were reviled not because they were conducted covertly under cover of night, but because they did not require any particularity or probable cause before issuance. The Supreme Court has relied on the original intent of the Framers in deciding that notice of a search is a basic aspect of whether a search is

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[2] *Oversight of the USA Patriot Act: Hearing Before the Senate Judiciary Committee*, 109th Cong. (2005) (Attorney General Gonzales Responding to Senator Feingold).

[3] Stephen D. Lobaugh, Congress's Response to September 11: Liberty's Protector, *1 Geo. J.L. & Pub. Pol'y 131, 143* (Winter 2002) (stating, "The Supreme Court has not ruled on the constitutionality of "sneak-and-peek" searches, and only two United States Courts of Appeals have heard such cases."). A third case, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000), relied upon by the Justice Department did not involve a criminal search warrant that the issuing judge approved be kept secret at the time the warrant was executed and the lower court ultimately found that law enforcement did not deliberately disregard the rules in failing to leave notice of the warrant.

[4] *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986).

[5] *United States v. Villegas*, 899 F.2d 1324, 1339 (2nd Cir. 1990).

[6] *Dalia* v. *United States*, 441 U.S. 238 (1979).

[7] Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.8(a) (4th ed. 2004).

[8] *Id.*

"reasonable," as expressly required by the Constitution. In *Wilson v. Arkansas*, Justice Thomas wrote for a unanimous court that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."[9]

Accordingly, the scope of permissible delay under section 213 of the Patriot Act is far broader than that contemplated by the appellate courts that examined sneak and peek authority prior to the Patriot Act. As such, supporters of modest Patriot Act reform have asked that Congress precisely delimit the period of delay. The bipartisan SAFE Act would create a time limit for the secrecy of such searches. The SAFE Act limits the initial period of delay to seven days, and allows that period to be renewed for good cause (for additional seven-day periods in the House version, and for 21-day periods in the Senate version). I commend Congressmen Flake and Conyers for co-sponsoring this legislation.

I would note that the notice, or knock and announce, principle has been allowed by the courts to give way to countervailing law enforcement interests in extraordinary circumstances, which leads me to the second fundamental flaw of section 213. The operative word here is extraordinary, something that the Patriot Act ignores by authorizing secrecy under circumstances that too many criminal cases might meet. This flaw is more substantively dangerous than the open-ended notice provision of section 213 because it telegraphs to law enforcement agents that they can relatively easily get approval for a secret search.

Specifically, 18 U.S.C. § 3103a(b)(1), enacted by the Patriot Act, requires an agent seeking a sneak and peek warrant to show that notice would have an "adverse result" as defined by 18 U.S.C. § 2705, to include destruction of evidence, danger to a person, flight from prosecution, witness tampering or "otherwise seriously jeopardizing an investigation or unduly delaying a trial." Leaving aside the issues of whether secret searches should be allowed generally in cases far afield from terrorism, the fifth provision–the catch-all exception--is the most problematic.

Congress should eliminate the catch-all exception and circumscribe section 213. On the evening before the Senate Judiciary Committee's first hearing in preparation for the sunsets debate, the Justice Department released new statistics showing a marked increase in the use of these secret searches. This, by the way, is another reason Congress should impose a sunset on section 213 so that it will not become a permanent fixture in our criminal system, and also give the Executive Branch some incentive to account for its use of this extraordinary power.

Between November 2001 and April 2003, the authorities used section 213 of the Patriot Act 47 times, a rate of 2.7 a month. Between April 2003 and January 2005, they requested and executed 108, a rate of 4.7 a month. At the Senate Judiciary Committee hearing, Chairman Specter disclosed that in a closed-door briefing DOJ admitted that 92 of the 155 sneak and peek searches that have been authorized since the Patriot Act have been under the vague "catch all" section, that there is "reasonable cause to believe that providing immediate notification of the execution of the warrant may" jeopardize an investigation.[10] That's nearly 60% of the time.

[9] 514 U.S. 927 (1995).
[10] *Oversight of the USA Patriot Act*, *supra* note 3.

The use of the catch-all will undoubtedly grow dramatically as the spotlight on the Patriot Act begins to fade. Arguably law enforcement could claim immediate notice of a search would jeopardize an investigation in many, perhaps most, criminal cases. Notably, agents have never been turned away in a request for a sneak and peek warrant.

One must recall exactly what happens when federal agents use section 213. The government obtains a search warrant that allows agents to break into a private residence, enter under cover of darkness, conduct an extensive search of the premises, retain digital or paper files, document the search with photographs, seize tangible property like DNA, and then leave.

In testimony before the Senate Select Committee on Intelligence, Attorney General Gonzales recently selected example of where the catch-all definition of "adverse result" was used to secure a sneak and peek warrant.[11] Although the scenario was ostensibly meant to illustrate the need for retaining the open-ended justification for sneak and peek warrants, I believe it actually showcased the problem with this provision:

In this case, the Justice Department obtained a delayed-notice search warrant for a Federal Express package that contained counterfeit credit cards. At the time of the search, it was very important not to disclose the existence of the federal investigation, as this would have exposed a related Title III wiretap that was ongoing for major drug trafficking activities.

An organized crime/drug enforcement task force, which included agents from the DEA, the IRS, the Pittsburgh Police Department and other state and local agencies was engaged in a multi-year investigation that resulted in the indictment of the largest drug trafficking organization ever prosecuted in the Western District of Pennsylvania.

While the drug trafficking investigation was ongoing, it became clear that several leaders of the drug trafficking conspiracy had ties to an ongoing credit card fraud operation. An investigation into the credit card fraud was undertaken and a search was made of a Federal Express package that contained fraudulent credit cards.

Had notice of the Federal Express search tied to the credit card fraud investigation been immediately given, it could have revealed the ongoing drug trafficking investigation prematurely, and the drug trafficking investigation might have been seriously jeopardized. Even modest delay would not have been available if this provision of Section 213 were deleted.

I would urge the Members of the Subcommittee to question the Attorney General at more length about this example.

First, I think it notable that this case does not involve terrorism at all. Although the Justice Department continues to argue that those of us who voted for the Patriot Act knew full well that this was an omnibus crime measure, not just a terrorism bill, I think that is disingenuous. Attorney General Ashcroft was quite clear in his admonitions that delay on passage of the Patriot Act would lay the blame for any future *terrorist* attack on our heads. Yet, as we saw in the

[11] *The USA Patriot Act of 2001: Hearing Before the United States Senate Select Committee on Intelligence*, 109th Cong. (2005) (testimony of Attorney General Alberto Gonzales).

Justice Department's field report on the use of section 213, released in September 2004, it appears that the government is using delayed-notification search warrants *primarily* in criminal cases.[12]

Second, I do not see how this example bolsters the case for retaining the catch-all definition of "adverse result" for sneak and peek warrants. Could the agents in this case have made a solid argument that notice of the search would have resulted in the destruction of evidence, flight from prosecution, or intimidation of persons or witnesses? If so, they could still have obtained a delay under more exacting rules. If not, what did they believe would be the result of providing notice?

Fixing this failing in section 213 is not difficult. The SAFE Act, in both the Senate and the House, would remove the catch-all provision. I urge the Subcommittee to support this modest improvement to the Patriot Act.

Finally, I would note the increasing use of sneak and peek searches. One of the primary reasons we insisted on including sunset provisions in the Patriot Act was out of fear that by breaking down checks and balances on government authority, we would encourage "mission creep" and the use of these broadened authorities in contexts far afield from counter-terrorism.

And, while I acknowledge the Justice Department's argument that the use of delayed-notification search warrants only represents a small fraction of the tangible searches conducted by federal authorities annually, I fear my concerns are not assuaged. Sneak and peek warrants are inherently problematic. They do not give you a chance to examine the warrant before execution for mistakes or to challenge it.

While I think anyone knowledgeable about the practical nature of law enforcement, criminal investigation and counter-terrorism can contemplate the need for this special power under very special circumstances, the Patriot Act really threatens to make what should be an extraordinary power an ordinary power. And for that reason, I ask you to support at least the modest changes to the language of the law embodied in the SAFE Act.

Additionally, I would note the there is incomplete information about how this power has been used. We know it has been used at least 155 times as of this January. What we do not know, and what the government isn't telling the Judiciary Committee or the American people, is:

- how many times section 213 has been used in terrorism cases, as opposed to more ordinary crimes;
- how many times it has been used against citizens, versus foreign suspects;
- how many times the secret warrants have led to prosecutions or convictions and how many of those were in terrorism cases; and
- what happens to the contents of such secret searches (taking photos of people's homes, copies of their computers or their even their DNA samples) if no charges are brought.

I will now turn briefly to the other sections that are a subject of this hearing.

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[12] DEPARTMENT OF JUSTICE, DELAYED NOTIFICATION SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME, Sept. 2004.

Section 223, which provides a civil remedy for victims of unlawful government surveillance, is a common-sense privacy protection measure and should be renewed. However, victims of secret surveillance abuse will often not know of such abuse and, as a result, the usefulness of section 223 is limited. Nevertheless, while it may be rare for an innocent person to discover they have been the victims of unlawful government surveillance, in such cases there should be a remedy, and section 223 provides one. It should be made permanent.

Sections 201 and 202 of the Patriot Act added new terrorism-related crimes to the list of criminal wiretapping predicates under Title III. While any expansion of federal wiretapping powers must give small government conservatives some pause, I personally regard these provisions of the Patriot Act as mainly beneficial to law enforcement and not unduly intrusive on the privacy of the American people. Title III requires a court order from a regular federal district court based on probable cause of crime, the time-honored Fourth Amendment standard that is lacking in surveillance orders approved by the special court that administers the Foreign Intelligence Surveillance Act (FISA). As a result, Title III surveillance is much less susceptible to abuse than FISA surveillance. The new wiretapping predicates listed in sections 201 and 202 are serious federal crimes. In my personal opinion, Congress should make sections 201 and 202 permanent.

I look forward to your questions. Thank you.